In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

NICK BALABANOFF,
Petitioner,

vs.

R. H. KELLOGG, C. P. MORGAN, PEARL E. KELLOGG, JOSEPHINE L. KELLOGG, LAURENCE SOWLES and MARTHA ALDRICH, doing business under the firm name and title of Cache Creek Mining Company,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit and the dissenting opinion of Circuit Judge Mathews is reported in 118 Fed. (2d) at p. 597, and are also attached to the certified copy of the transcript as an appendix.

ARGUMENT.

This is a suit in which an injunction was granted enjoining defendant from use of waters on Nuggett Creek, Alaska, where the placer mines of both litigants are situate.

The Courts, both trial and appellate, agree that the complaint did not state a cause of action.

The Circuit Court of Appeals, however, in the prevailing opinion expounds new doctrines, (a) that because some testimony was taken at the trial *"which tends to show* that the Old Company Ditch was the earliest on the stream" and therefore (b) "We here treat the complaint as amended to *conform* to the proof." (Italics ours.) We respectfully urge that something *which tends to show* is not proof of a fact and further that the Court had no jurisdiction to treat the complaint as amended to conform to the proof, even if there had been full "proof" of the fact instead of "tend to prove" introduced at the trial.

Congress has provided for Alaska:

> "That * * * the forms of pleading * * * and the rules by which the sufficiency of such pleadings is to be determined shall be those prescribed by this Code."
>
> Sec. 886 C. Laws (1913) and

Also for a complaint.

> Sec. 874 C. Laws.
>
> "* * * it shall contain a plain and concise statement of facts constituting the cause of action * * *"
>
> Sec. 889 Id.

> "If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, *excepting* only * * * the objection that the complaint does not state facts sufficient to constitute a cause of action." (Italics added.)
>
> Sec. 864 C. Laws 1913.

Therefore that objection is under the law always present.

The Court *may allow* amendments to pleadings (Sec. 974 C. L.) but here there was no request nor order for an amendment and none was made.

We contend that a person who has a cause of action may, if he so desires, proceed by filing a complaint to invoke the power of the Court, but such party is not *obliged* to file a complaint nor amend his complaint if he files one. That is the party's privilege and his alone and he may waive it although such waiver may be against his interests.

It is not a Court's privilege to act for a litigant and especially as to an objection where the statute says specifically it shall not be waived.

It is the duty of the Court to look at the pleadings.

United Shoe v. U. S., 258 U. S. 451.

Nor can the Court aid the allegations of the bill by construction. The bill must be determined as to its equity, "upon the averments contained in it, unaided by construction and unamplified by assumed amendment." The complainant is the actor, and he must present a case entitling him to injunctive relief, or it will be denied. He can be aided by "no rule of

favor, like that of assumed amendment to his initial pleading."

Dean v. Goose Co. Lumber Co., 167 So. p. 570.

"* * * 'But such a decree, if the complainant were entitled to it under the proofs, would be entirely outside of the pleadings on a case not made or contemplated by the bill, and to which the defendant has not been called upon to answer, and, in fact, has not answered. The recovery must be had upon the case made by the pleadings or not at all.' Grosholz v. Newman, 21 Wall. 481, 488. No relief can be granted for matters not charged in the bill, and a party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved. Beach Modern Eq. Prac. Secs. 99, 100, 790, and the text-books and numerous authorities cited in the notes."

Baldwin v. Liverpool & L. & G. Ins. Co., 124 Fed. 206, 208, at page 208.

"Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. Bank of U. S. v. Smith, 11 Wheat. 171, 174; Minor v. Mechanic's Bank, 1 Pet. 46, 67; DeLuca v. Hughes, 96 Fed. 923."

Garrett v. Louisville & N. R. Co., 235 U. S. 242, at pp. 244, 245.

"Pleadings are the allegations made by the parties for the purpose of definitely presenting the issues to be tried, and to determine between them."

Tucker v. U. S., 151 U. S. 164.

"A decree granting relief must be based either on the bill and the admissions of the answer, or on the bill and the proof sustaining the cause made in the bill.

A decree cannot be based on allegations without pertinent proof nor on proof without corresponding allegations."

Street, Federal Eq. Pr. (Vol. 2), Sec. 1939, p. 1162.

"Every bill must contain in itself sufficient matter of fact to maintain plaintiff's case."

Harrison v. Mixon, 9 Pet. 493, at p. 503.

"Probata which do not conform to allegata cannot be the ground for decision."

Id. p. 503.

"It is the general rule that the question whether the complaint states facts sufficient to constitute a cause of action is never waived, and may be taken advantage of for the first time in the appellate court and the judgment reversed."

21 *R. C. L.* Sec. 161, p. 624, citing

Slocum v. Pomeroy, 6 Cranch 221;

McAllister v. Kuhn, 96 U. S. 87;

Teal v. Walker, 111 U. S. 242;

Cragen v. Lovell, 109 U. S. 194.

Courts cannot supply omissions in legislation, nor afford relief, because they are supposed to exist.

To adopt the language of Mr. Justice Woods in *Hobbs v. McLean,* 117 U. S. 579:

> "When a provision is left out of a statute either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate, and not to construe."
>
> "* * * It is our duty to interpret, not to make, the law. Words should not be interpreted into a statute, in order that it may include a case which has been omitted merely because there seems to be no good reason why it should have been omitted."
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> *Grace v. Collector of Customs,* 79 Fed. 315 at p. 318.

> "No mere omission or failure to provide for contingencies will justify judicial addition to statute."
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> *McRee v. U. S.,* 164 U. S. 287, p. 293;
> *U. S. v. Goldenberg,* 168 U. S. 95, p. 103.

> "If Legislatures proceed on a mistake it is dangerous to declare that a court of law is bound to enlarge the natural import of the words in order to supply deficiencies occasioned by that mistake."
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> *Barnitz v. Casey,* 7 Cr. 456 (U. S.) p. 468.

> "Since the power to make, alter or repeal laws is legislative, the courts will not encroach upon the domain of a co-ordinate department of the government by judicial enlargement, abridgement, alteration, or repeal of legislative enactment."
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> 11 *Am. Jur.* 197, citing
> *Ebert v. Poston,* 266 U. S. 548.

"Legislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

11 *Am. Jur.* Sec. 204, p. 907;

Ross v. Oregon, 227 U. S. 150;

Prentiss v. Atlantic Coast Line, 211 U. S. 216;

Sinking Fund, 99 U. S. 700.

"The judicial power is exercised in the decision of cases; the legislative in making laws."

Penn v. Wheeling, 18 How. U. S. 421.

"If the law-making power says that a matter within its competence shall be so, so it will be, so far as legal theory is concerned, without regard to the *elegantia juris,* or whether it fits that theory or not."

Wedding v. Meyler, 192 U. S. 573 (Mr. Justice Holmes).

" . . . It is fundamental that a judgement cannot stand unless the facts of record,—apart from any showing by bill of exceptions—aided as far as may be by the verdict, will support it."

Slocum v. Pomeroy, 6 Cranch 224;

United States Bank v. Smith, 11 Wheat. 172;

World's Col. Expos. Co. v. Republic of France, 91 Fed. Rep. 64, at page 69.

"In equity the proof must conform to the allegations, and the examination of the court is confined to the issues made by the pleadings. (Providence Rubber Company v. Goodyear, 9 Wall. 788, 799, 804; Agawam Woolen Co. v. Jor-

dan. 7 Wall. 583, 610; Andrews v. Drake, 83 Fed. (2d) 767; Lewis Teese et al. v. Huntington, 23 How. 2, 14; Ferguson Cont. Co. v. Manhattan Trust Co. 118 Fed. 791; Hitchcock v. American Gas Co., 259 F. 948; General Elec. Co. v. Continental Lamp Works, 280 Fed. 846)."

Reynolds Spring Co. v. Young, 101 Fed. Rep. (2d) 257, at p. 259.

"It has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. . . . The right of the first appropriator, exercised within reasonable limits, is respected and enforced. . . . The Act of Congress of 1866 recognized the right to water by prior appropriation."

Basey v. Gallagher, 20 Wall. 676 (Field J.).

See also,

Atchison v. Peterson, 20 Wall. 507.

Followed in

Hornbuckle v. Stafford, 111 U. S. 392;

Krall v. U. S., 79 Fed. 243, 174 U. S. 338.

"Water appropriated for use on claim in gulch must, after use, be discharged therefrom for use of claims below."

Alder Gulch Mg. Co. v. Hayes, 6 Mont. 38, 9 Pac. 585.

"Appropriation does not confer such an absolute right to the body of water diverted that owner can allow it to run to waste and prevent others from using it."

Atchison v. Peterson, 20 Wall. 507.

The evidence adduced at the trial did not show an appropriation of water by complainant. Simply that at times it diverted water through a ditch to use hydraulically.

An appropriation can only be made of water that is *then* unappropriated.

If water is being used for a beneficial purpose it cannot be taken away from the first user except upon the allegation and proof of seven years continuous adverse use by the second user.

It was alleged in plaintiff's complaint that *both* the plaintiff and defendant were using the water of Nuggett Creek and that the Creek was located from source to mouth as placer mines. That does not allege an adverse user. It was in evidence that mining commenced on Nuggett Creek in 1906 and no contradiction. That all parties were mining more or less on the creek and that three mine operators at least excavated and used ditches and that plaintiff also used water through ditches but how much and over what periods was not shown. Such evidence does now show continuous nor adverse user.

There was no measurement of the water made, yet the trial court awarded an exact measurement of 360 inches of water.

The mines naturally were there before ditches—ditches are not necessary to placer mining, but water is, and was when the placer mines were located. Did the ditch builder take away the miner's sluice box water? There is no evidence of when, if he did. There

is no evidence of inception of title or when or how initiated.

> "An adverse use of water for the statutory period must be open, notorious, peaceable, continuous and under claim of right."
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> *Mining Co. v. Dangberg,* 81 Fed. 115;
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> *Mining Debris Cases,* 18 Fed. 753;
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> *Winter v. Winter,* 8 Nev. 192.

> "Evidence of a prescriptive right must be clear and conclusive."
>
> *Morris v. Bear,* 140 Fed. 433.

> "The right acquired by prescription is only commensurate with the right enjoyed. A mere scrambling possession of the water gives no prescriptive right, nor can this right be acquired if, during the time in which such right is claimed to have accrued, there has been an abundant supply of water in the stream for all other claimants."
>
> *Union Co. v. Dangberg,* 81 Fed. 115.

> "Where adverse possession is relied upon to give title, possession for full period required by statute must be definitely shown."
>
> *Grosholz v. Newman,* 21 Wall. 481 (at p. 487).

The right of the first appropriator is fixed by his appropriation and when others locate upon the stream, or appropriate the water, he cannot change his original appropriation, or make any change in the channel to their injury.

All that is alleged in the complaint in that regard is as to a proposed diversion *above* the intake of the Old Company ditch. (Par. V, Par. VIII Complaint.)

It is not alleged nor was it shown by evidence as to when *low water* season begins or when it ends, or when was the normal flow, (Par. VIII Tr. p. 5) or when the ditch owners used most or the miners used it. Because if the miners were not using the water all the time the ditch owners could for that period when not in use, take all the water for the time being.

The opinion says:

> "Exact measurements were not taken either of the volume of water in the creek or of the quantity used in the Company's hydraulic operations. But scientific accuracy is too much to expect in cases of this character arising in that primitive country."

But the decree is exact. It gives the appellee exactly 360 miner's inches of water and this, although as stated in the opinion, there was no evidence of measurement except that water that flowed through nozzles.

About the only testimony on measurement was that of Harper, who said "I was using two three inch nozzles under, I *think,* a 325 foot head". (Tr. p. 71.) (Italics ours.)

From these facts it is impossible to compute the volume of water since the size of, and the head at, the intake, the size of the pipe, the length of the pipe, the condition of the pipe as well as the number of bends and angles must be known before the volume of water discharged through the nozzles can be computed.

The *Van Dyke v. Midnight Sun* case, 177 Fed. 85, cited as authority in the prevailing opinion in this

case, is, we think, directly contrary to the conclusion applied thereto in this case by it.

In the *Midnight Sun* case it is written:

> "There is nothing, however, *in the evidence,* nor, indeed *in the pleading* of the plaintiffs in error, tending to show the amount of the water in the creek they had diverted for beneficial purposes prior to the appropriation under which the defendant in error claims. Inasmuch as the statutes of Alaska make no provision respecting the necessity of either the posting or recording of notices of appropriation of waters upon the public land, we think no such notice essential to the validity of a bona fide diversion of such waters for a beneficial use in Alaska, and therefore, in the final judgment to be entered in this cause, *care should be taken to provide that it be without prejudice to any rights the plaintiffs in error may be able to establish to any of the waters of Hurrah Creek by virtue of any appropriation made by them,* or those under whom they claim, for beneficial uses, prior to the appropriation under which the defendant in error holds." (Italics added.)

So, we urge that an inception of the use of water not *theretofore appropriated* should be alleged and must be shown and *neither* was proven in the instant case.

That at different or the same times, as was shown by the evidence, some water was used on other mines on the creek, does not even tend to show that water had not theretofore been appropriated by some then user thereof.

As between two appropriators of same water flowing over the public lands in Alaska, priority of time gives priority of right.

Miocene Co. v. Campion, 3 Alaska 572;
Egler v. Baker, 4 Alaska 142.

In *Broder v. Water Company,* 101 U. S. 276, 25 L. Ed. 760, the Court said:

> "It is the established doctrine of this Court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation in the region where such artificial use of the water was an absolute necessity, are rights which the government had by its conduct recognized and encouraged, and was bound to protect, before the act of 1866."

We therefore most respectfully submit that the United States Circuit Court of Appeals for the Ninth Circuit has gone far afield from the usual course of judicial proceedings and that this decision is in direct conflict with all other decisions of our Federal Courts on the doctrine of appropriation and the right to use water on the public domain.

Dated, San Francisco, California,
June 4, 1941.

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